92-2000

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER 1993 TERM

WILLIAM A. HOUCK,
Petitioner

v.

WAYNE T. STEPHENS, JOSEPH DADDONA, and CITY OF ALLENTOWN,
Respondents

Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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122 pp

QUESTION PRESENTED FOR REVIEW

1) Whether or not the Court of Appeals for the Third Circuit erred as a matter of law in affirming the trial court's order of summary judgment in favor of Respondents/Police Officers, where the district court accepted Respondents' hotly contested, self-serving oral version of the facts with no supporting written documentation and disregarded Petitioner's/police officers substantial evidence supporting Petitioner's claims pursuant to 42 U.S.C. Section 1983?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, William A. Houck, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered March 22, 1992, is unrecorded and appears at page 1a of the Appendix.

The Order of the United States Court of Appeals for the Third Circuit, dated February 26, 1993, is unrecorded and appears at page 3a of the Appendix.

The Order of the United States District Court for the Eastern District of Pennsylvania dated July 15, 1992 is unrecorded and appears at page 23a of the Appendix.

The Order of United States District Court for the Eastern District of Pennsylvania dated May 4, 1992 is recorded at _____ F. Supp. _____ (E.D. Pa. 1992) and appears at page 31a of the Appendix.

The Final Order of the Court of Appeals for the Third Circuit was dated

March 22, 1993, and this Petition for Writ of Certiorari was timely filed within ninety (90) days thereof.

The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of the Honorable Court.

FEDERAL PROVISIONS INVOLVED

42 U.S.C. Section 1983.

United States Constitution, Amendment 1.

STATEMENT OF THE CASE

Petitioner, William A. Houck, filed this action against Respondents seeking damages arising out of Respondents' alleged violation of Petitioner's constitutional rights. Specifically, Petitioner alleges that Respondents refused to promote Petitioner to the position of Sergeant in Respondent City Police Department in retaliation for Petitioner exercising Petitioner's First Amendment right to freedom of speech.

The District Court first denied Respondents' motion to dismiss Plaintiff's/Petitioner's Complaint. Defendants/Respondents then moved for summary judgment. On May 5, 1992, the District Court entered an order granting Respondent's motion. On July 15, 1992, the District Court entered an Order denying Petitioner's Motion to Reconsider

the Order of May 5, 1992. The Third Circuit Court affirmed the District Court order on February 26, 1993 and then denied Petitioner's Motion for Re-Hearing.

This Petitioner respectfully seeks review by this Honorable Court.

STATEMENT OF FACTS

Petitioner's cause of action against Respondent, Wayne T. Stephens and Respondents, Joseph Daddona arise out of the individual Respondent's actions as "high governmental official[s] of the City of Allentown with the duty and authority to establish official governmental policies for the City of Allentown."

Petitioner's evidence supports Petitioner's claim against Respondent as follows:

Petitioner, William A. Houck, is 38 years of age, having been born on May 2, 1953. He graduated from William allen

High School in Allentown, Pennsylvania in 1971, and from Wheaton College in Wheaton, Illinois, cum laude, in 1975 with a Bachelor of Arts in Psychology. Petitioner graduated first place, scholastically from the Allentown Police Academy in November of 1977.

Petitioner has been continuously employed as a policeman with the Allentown Police Department from August 1, 1977 to the present. During his tenure as a policeman, Petitioner has received five (5) commendations as follows: two for heroism; two merit commendations; and one commendatory letter.

When Arthur A. Allender was Chief of Police, there were considerable divisions within the department because of a group of officers known as "the clique" who were a disruptive force because they were involved in physical intimidation of other

police officers and person assisted by the Allentown Police Department. The six members of the clique were Wayne Stephens, Roger MacLean, Thomas Bennis, Roger Sames, Dennis Troccolla, and Harold Boyer. Wayne Stephens and Roger MacLean are related to each other and are close friends. In addition, Wayne Stephens owns a hunting lodge at which Roger MacLean, Thomas Bennis, and Dennis Troccolla were members.

After Allender was replaced as Chief of Police by Carson Gable, Gable recommended the demotion of Stephens, Troccolla, Sames, MacLean and Bennis. Mayor Daddona went along with Gable's recommendation except for Wayne Stephens. The reasons for the decision to demote the four members of the clique but not Stephens are unknown to Petitioner. It was common knowledge in the police department that Petitioner has had several

"run-ins" with the clique, including Wayne Stephens, including the following instances:

1. Petitioner was involved in an attempt to rescue a drowning African American youth at Bucky Boyle Park. After Petitioner brought the youth from the bottom of the pool, he was chastised by then Lt. Wayne Stephens because he left his traffic post to save a "nigger." Petitioner protested his racist remark, and told Lt. Stephens that saving a youth's life was a far more important function of a police officer than directing traffic.

2. Petitioner had custody of a drunken prisoner who was under his control and supervision. The prisoner was hand cuffed, was verbally abusive because of his drunkenness, but he was not a threat to anyone. Then Lieutenant Wayne Stephens and Sergeant Troccolla came up to Petitioner and the prisoner in a physically menacing manner and indicated to the prisoner that they were going to teach him some respect for the Allentown Police Department. At that point Petitioner stepped between the prisoner and Troccolla/Stephens in order to protect the prisoner, and told

them that the prisoner was in Petitioner's custody, and that he was responsible for the prisoner, and that he had the prisoner under control.

3. Petitioner was working a night shift on the south side in a police vehicle, and was nearly involved in a traffic accident with an obviously reckless driver. The vehicle sped away and Petitioner gave pursuit, Petitioner lost control with the vehicle for a short time, but subsequently saw it parked on the side of the road, and two off-duty officers, Bennis and Sames were standing outside of the vehicle waving to Petitioner with open beer cans in their hands laughing. Petitioner subsequently reported the incident to his supervisor who stopped the two later that night after two more incidents, but no arrest was made because they were members of the clique.

After Allender was replaced as Chief with Carson Gable by Mayor Daddona, there was an investigation into instances of alleged falsification of court subpoena cards in order to get paid full days off from the City. Basically, the way the

scam worked was that members of the clique would check to see what cases were coming up for the next term of criminal court, and then they added their names to several of the cases as necessary witness by giving falsified subpoena cards to their supervisors, even though they were not in any way involved in the arrests or trial. Once the clique members were added to the list of witnesses, they would then be paid for a full day off even though they never appeared at trial as witnesses. According to Carson Gable, five members of the clique were involved in the scam, namely Troccolla, Bennis, MacLean, Boyer, and Stephens.

Initially, Chief Gable initiated charges only against Troccolla because he was the most flagrant abuser of the process, with the understanding that subsequent disciplinary action would be

taken against the other four officers. Petitioner was called as a witness in the Troccolla matter because Troccolla had used one of Petitioner's arrest cases to get a paid compensation day and he was not in any way involved in the case. Petitioner testified at a hearing in front of City Council. After his testimony, Petitioner spoke with then City Solicitor, Joseph Rosenfeld, about testifying again as a rebuttal witness. Prior to Petitioner's second appearance, Roger Sames confronted him and warned him very forcefully about testifying as a rebuttal witness. The case was then resolved before City Council without being called as a rebuttal witness.

Sometime during 1984, after the demotion of Bennis, MacLean, Troccolla, and Sames, Mayor Daddona promoted Wayne Stephens to Captain on the recommendation

of the Chief Howells. Because of Wayne Stephen's leadership of this clique and because of his involvement with the subpoena scandal, Petitioner called for a special meeting of the Fraternal Order of Police [FOP] to protest the lack of a formal a promotion procedure within the Allentown Police Department and to protest Wayne Stephen's promotion. At the meeting, no formal action was initiated by the FOP against the lack of the promotion system, and instead the membership gave a vote of confidence to the new Chief of Police David Howells. After the meeting, Wayne Stephens confronted Petitioner and threatened to get even with him and that he would never forget Petitioner's involvement in protesting his promotion.

In the course of an investigation, Petitioner received a copy of a "diary" of an unidentified author purporting to

indicate police and local government corruption in the City of Allentown. At no time did Petitioner represent to anyone that the diary was accurate or that the charges therein were truthful. As a conscientious police officer, Petitioner turned over the diary directly to Chief of Police Howells, and told him how it had been acquired. Petitioner was not functioning as a detective, and much to Petitioner's surprise, Chief of Police Howells assigned to the Petitioner, the job of investigating the charges made therein, which included alleged criminal wrongdoing by unnamed Allentown police officers. During the course of investigation, Petitioner advised the Chief of Police that Petitioner had in his possession a handwriting specimen for the source who provided the diary, and that Petitioner had his source's consent to a

polygraph test, but the Chief never followed through with the handwriting exam or the polygraph test. As a result of being assigned this investigatory task relating to police corruption, Petitioner incurred personal animosity from various police officers, including Harold Boyer, and Dennis Troccolla. Petitioner was approached by Sergeants Mitchell and Giacobbe, who indicated that, at one point in the investigation, there were serious rumblings that Petitioner's life was in danger. At no point in this investigation did Petitioner ever accuse any police officer of wrongdoing, and the primary reason no accusation was made was because Petitioner was never able to verify the authenticity of the diary. One of the major reasons Petitioner was not able to prove -- or disprove -- the authenticity of the diary was because the Chief of

Police would not follow through with the handwriting sample and polygraph that Petitioner had arranged and requested. Petitioner suspected that his source had fabricated the diary, which could have been determined by the handwriting and polygraph tests. Since Chief Howells never followed through, and never assigned detectives to investigate the diary, the investigation was inconclusive.

After the police demotion cases were instituted by MacLean, Bennis, Troccolla and Sames, Petitioner was approached by lawyers representing the City to testify against the clique because many people in the department were aware of the incidents in which Petitioner was involved. Petitioner expressed his reluctance to testify in the deposition against the clique because Mayor Daddona was sending contradictory signals about it, namely,

the four were demoted, but the leader of the clique, Wayne Stephens, was not demoted, and in fact had received a promotion from Mayor Daddona. Petitioner expressed his reluctance to Robert Hanna, Esquire, about testifying against the clique, and especially Stephens, because he was afraid of retaliatory conduct from Stephens who was then a Captain in the Department and who had threatened Petitioner in the past. Petitioner was assured by Robert Hanna, Esquire, that Petitioner would not be retaliated against by the clique, and that Mayor Daddona would personally guarantee Petitioner that no members of the clique would ever be in a position to retaliate against him for hist testimony. Based upon these assurances from the Mayor's legal representative, Petitioner freely and voluntarily gave a deposition as requested

by Mayor Daddona.

In the summer of 1985, Petitioner was contacted by Terry Marinari of the U.S. Attorney's office in Philadelphia who was allegedly investigating police corruption in the Allentown Police Department. One of the matters of about which Petitioner provided information was the police subpoena scandal which involved Stephens, Boyer, Troccolla, Bennis and MacLean. Petitioner specifically agreed to discuss this matter only in the strictest of confidence, and Marinari assured him that she would honor his request for confidentiality. Before the end of the summer, Petitioner was approached by Chief Howells who advised him that F.B.I. Agent Klaus Rohr was a personal friend of his and that other members of the police department, and that F.B.I. Agent Rohr told them that Petitioner was giving

information to the U.S. Attorney's office.

Petitioner then telephoned Assistant U.S. Attorney Marinari, and asked why she breached her pledge of confidentiality. She admitted that she shared the information with Agent Rohr, and apologized to Petitioner that he leaked it to the Allentown Police Department. Petitioner told Assistant U.S. Attorney Marinari that he would not provide her with any further information because her leaks were going to get him killed.

After Petitioner declined to cooperate with her further, he was contacted by Assistant U.S. Attorney James Becker who asked him to come to his office to be interviewed about police corruption in Allentown. Petitioner than shared information with Assistant U.S. Attorney Becker about Stephen's involvement in falsifying court subpoena cards so that

Stephens could receive compensation pay. Petitioner also gave Assistant U.S. Attorney Becker information that the Allentown Police Department had wire-tap equipment that supposedly was missing from inventory and that the wire-tap equipment was used by the clique to illegally record conversations of Allentown police officers as an intimidation devise. Petitioner also gave the U.S. Attorney's Office information about ticket fixing at the District Magistrate level. Petitioner was subsequently advised by Chief Howells that Petitioner had continued to talk with the U.S. Attorney's Office and that Petitioner's discussion of the Allentown Police Department was jeopardizing Petitioner's career within the department.

In October of 1985, Petitioner personally became aware, in one of his cases, that one of the district justices

was involved in ticket fixing. Petitioner reported the information to Assistant Chief Monaghan who failed to take any corrective action. Petitioner then wrote a letter to President Judge Backenstoe about the facts and circumstances relating to one District Magistrate in one of his cases. As a result of Petitioner's letter to the President Judge, Assistant Chief Monaghan chastised Petitioner for going over head, and advised Petitioner that the Allentown Police manual (referred to as the "Blue Book") was being amended to preclude policemen from giving information to outside agencies, including judges, without the Chief's written approval. The amendment was made because of Petitioner's letter to President Judge Backenstoe and Petitioner's contact with the U.S. Attorney. Assistant Chief Monaghan indicated that Petitioner's actions of

talking to the U.S. Attorney about police corruption and in writing letters to President Judge Backenstoe necessitated these charges because, under the original blue book, Petitioner could not be disciplined since he was talking to official police and court administrators. Under the amendment, Petitioner could be disciplined for talking to the U.S. Attorney or the President Judge unless the Chief had granted him permission to do so.

Although Stephens was a known member of the clique, although he clique members sued Mayor Daddona in Federal Court and although Stephens had been adjudicated in Federal Court as a police officer who engaged in excessive use of force (see Black vs. Stephens, et al., 662 F.2d 181 (3rd Cir, 1981), cert denied, 455 U.S. 1008, 71 L.E.2d 876, 102 S.Ct. 1646 (1982)), Mayor Daddona inexplicably

changed gears and promoted Wayne Stephens to be Chief of Police of the Allentown Police Department in the Fall of 1987. Under Chief Stephens, members of the clique received numerous promotions:

Harold Boyer to Captain .....
February 4, 1989
Harold Boyer to Dep. Asst. Chief.....
January 6, 1990
Roger Sames to Detective Sergeant ...
January 12, 1988
Dennis Troccolla .....
January 12, 1988
Roger MacLean to Lieutenant .....
July 21, 1990
Thomas Bennis to Lieutenant .....
January 5, 1991

In addition, the Chief's brother, James Stephens, was also promoted by the Chief:

James Stephens to Detective Sgt.....
April 9, 1988

Immediately upon Stephens becoming the Chief, Petitioner was transferred from the third platoon (rotating swing shift) to the fifth platoon (steady nights -- 7:00 pm to 3:00 am) over Petitioner's

objections and over the objections of Petitioner's immediate supervisor, Lt. John Kerrigan. This shift was not popular for married officers, but a lot of younger unmarried officers wanted it.

In 1988, there were only two officers certified in hostage negotiation, namely, Sgt. John Barnhart and the Petitioner. In January of 1988, an Emergency Response Team was organized which was supposed to include the sharpshooters, the entry team, and hostage negotiations. Petitioner has a Bachelor's degree in Psychology and has received a departmental commendation for talking out an armed barricaded suspect and although Petitioner was only one of two certified negotiators, Petitioner was intentionally excluded from the team by Chief Stephens because of the prior episodes in which Petitioner exercised his right of free speech by testifying against

Chief Stephens and by cooperating with the U.S. Attorney's investigation into police corruption in the Allentown Police Department.

On August 7, 1989, Petitioner was confronted by Chief Stephens and Assistant Chief Monaghan, in the presence of FOP attorney, Aaron Matte, Esquire, and FOP President, Paul Snyder, who advised Petitioner that they were in possession of a series of illegally taped telephone conversations allegedly between Petitioner's wife and television reporters, and between Petitioner and television reporters. The Allentown Police Department had wire tap equipment which was never supposed to be used without a search warrant obtained by the Pennsylvania Attorney General's office. A member of the clique, Thomas Bennis, had expertise in using wire tapping equipment.

Stephens and Monaghan attempted to intimidate Petitioner because they now were claiming to have tapes which they could use against Petitioner (and his wife) under the amended Blue Book, Regulation No. 1.09. Instead of being intimidated, Petitioner told them than an illegal taping device of Petitioner's family's telephone conversations would subject the person doing the taping to criminal prosecution.

In the Depositions of Chief Stephens and Assistant Chief Monaghan, they admitted having possession of these illegal tape recordings of Petitioner's family telephone conversations. In the course of discovery Petitioner has asked for the opportunity to hear these illegal tapes but has been unable to gain access to them due to an "illness" of Chief Stephens. Petitioner has been told that

he must await Chief Stephen's return to work in order to hear them. As a result of these illegal tapes of telephone conversations in the possession of Chief Stephens and other matters addressed, Petitioner has been subpoenaed to testify in front of the Pennsylvania Crime Commission on October 22, 1991, thereafter changed to October 24, 1991.

In January, 1990, Petitioner took a standardized competitive examination for two separate positions: Patrol Sergeant, and Investigation Sergeant; and he placed first on the examination with a 66.89%, and Petitioner's brother, Thomas, placed second with a 65.52%. For the first time in this history of the Allentown Police Department, objective criteria was being used to award promotions pursuant to "General Order 309, Promotion Procedures." Unless these new criteria, seniority was

supposed to account for up to 5 points, and according to the City's own documents, Petitioner received 5 points for seniority, and Petitioner's brother received 4.416 points for seniority. Hence, using the City's objective criteria, Petitioner was the only person who passed the examination with a score of 71.78% computed as follows:

WILLIAM HOUCK

66.89%	**Test**
5.00%	**Seniority**
71.89%	**TOTAL**

THOMAS HOUCK

65.520%	**Test**
4.416%	**Seniority**
69.936%	**TOTAL**

If the scores are rounded to the next greater whole number, only Petitioner's brother and Petitioner passed, with 72% and Petitioner's brother, Thomas, with 70%. If the scores are not rounded to the next greater whole number, only Petitioner

passed the test with a 71.89%, Petitioner's brother with a 69.936%.

With the above conclusions in mind, Respondent, Stephens, began the first part of his conspiracy to deprive Petitioner of a promotion by falsely claiming that no one passed the test, and that the procedure had to be modified to change the lowest passing score. See, deposition of Stephens where he falsely claimed the following:

> "Q. Did any of the sergeant candidates pass the test.
> A. No
> Q. A passing grade was 70, correct?
> A. It was supposed to be 70, but there were no 70's."

Stephens refused to give Petitioner the grade which the City's own records verified that Petitioner had received -- 66.89% raw test plus 5% seniority -- because there would have been only one passing candidate (William Houck) and two

passing candidates if scores were rounded to the nearest number (William Houck and Thomas Houck). This first part of the conspiracy was intended to deny Petitioner a promotion because of Petitioner's exercise of his constitutional right to free speech, namely failure to give Petitioner a passing score, and then lowering the standards so the list of eligible candidates could be increased. See memorandum of January 9, 1990 indicating that the minimum passing grade was changed to 55.52%.

Even with this new post facto change, Petitioner still should have received the promotion because 15% of the score was supposed to be based upon written departmental evaluations by the chief, one assistant chief, two other members who were at least captains and the officer's primary supervisor. In actual fact, the

City used written evaluation forms where Petitioner was rated "above average" with "...the potential to develop into an outstanding officer." In depositions, both Chief Stephens and Assistant Chief Monaghan conceded that they did not follow the procedures for basing 15% on the written evaluations and that the immediate supervisors were not contacted, and instead, Stephens, Monaghan, Boyer, and Warmkessel sat around in a room and orally determined what they thought the written evaluations would have been if they followed through with written evaluations, and then orally assigned each candidate a number, arrived at by consensus, as to what the group thought the written evaluations would reflect, evaluating Petitioner with a number under the minimum possible. In addition, there were oral interviews where the persons doing the

interviews were hand picked by Chief Stephens.

There was only one lay person on the panel who was a City employee, namely Jill Winters. In her notes, she indicated that Petitioner "...would be good at investigating -- good arrest record." She also indicated that Petitioner "...can talk with people -- rapport -- respects people -- 91 arrests last year." Then, inexplicably, she gave Petitioner a score of 8 out of 15 points, which was written over to indicate 6 out of 15 points, and then written over again to reduce Petitioner to 4 out of 15 points.

Before the oral interviews and written evaluations, Petitioner had a total of 71.89% on the written test score and the seniority. After the amended oral interview/oral written evaluation processing score dropped from 71.89% to

51.14% for Patrol Sergeant and 51.81% for Investigation Sergeant. The City's "justification" for this absurd result is as follows:

INVESTIGATION SERGEANT

Petitioner was awarded 65% of his raw score of 66.89% or	43.48%
Petitioner received 5 points for seniority	5.00%
Amended Oral Interviews/ Oral Written Evaluation (Maximum of 15 points possible)	3.33%
TOTAL	**51.81%**

PATROL SERGEANT

Petitioner was awarded 65% of his raw score of 66.89% or	43.48%
Petitioner received 5 points for seniority	5.00%
Amended Oral Interviews/ Oral Written Evaluation (Maximum of 15 points possible)	2.66%
TOTAL	**51.14%**

When the test was objective, Petitioner was first on the list. Stephens and the City effectively obliterated the 15% possible for written

evaluations by ignoring the requirement for written evaluations and the written supervisor's evaluations on file and arbitrarily establishing an oral evaluation by the Chief in violation of General Order 309. Stephens, Monaghan and Boyer sabotaged Petitioner's oral interviews by getting Jill Winters, the only non-police person on the panel, to change her score from an 8 out of 15 to a 4 out of 15 points. Assistant Chief Gerald Monaghan claims that Petitioner lost points because of sick time -- and that worker's compensation time was not counted as sick time. In fact, in his case, almost all days off related to a worker's compensation injury which occurred in November of 1984, and Monaghan violated his own rule by including worker's compensation time in sick time.

Monaghan admits knowing that Stephens

was known as a member of the clique. Monaghan also admits that the Blue Book regulation was amended to keep Petitioner from exercising his right to speak to other law enforcement officials about the Allentown Police Department:

> "Q. Do you recall was there a change in the blue book relative to police officers talking to unauthorized people?
> A. Yes.
> Q. Okay. When was that change made?
> A. That change was made when I found out Mr. Houck was talking to -- I wish I could remember. I call that one the William Houck amendment to our blue book.
> Q. So there is a specific amendment?
> A. I call it that. That was a personal thing because Mr. Houck was talking to people, civilians, newspaper people outside of the police department, taking confidential police information off police reports outside the police department, and it was not covered in the blue book."

[Deposition of Monaghan at pages 27 through 28].

Assistant Chief Monaghan also admits

chastising Petitioner for his family's telephone conversations which were illegally taped.

"Q. And that you or people in your presence represented that they had tapes of either him or his wife or both, tapes of those telephone conversations. Did that transpire?
A. Yes.
Q. How many tapes are there?
A. I don't know. There's a couple of them. I don't know how many relate specifically to the Houck family. I can say there's probably one or two specifically related to the Houck family and their conversations with this person.
Q. Tapes of telephone conversations?
A. Yes."
[Deposition of Monaghan at page 32].

Assistant Chief Monaghan further admitted that they short circuited the written evaluation process, and no one filled out written evaluations on any of the candidates for sergeant.

"Q. You did not fill out that form?
A. No.
Q. Chief Stephens didn't fill out the form?

A. No.
Q. Would it be Chief Boyer also filling out that form?
A. Yes.
Q. And he didn't fill out that form?
A. Right.
Q. And who would have been the fifth one?
A. It would have to be a captain.
Q. Another captain?
A. Captain Warmkessel.
Q. And he didn't fill out that form?
A. No."
[Deposition of Monaghan, at pages 42 through 43].

Wayne Stephens testified that he was aware of the fact that Petitioner gave a deposition to Robert Hanna about him and the clique in which he was characterized in an unfavorable light.

Wayne Stephens also admitted that he indicated to Petitioner that Petitioner would be denied a commendation for attempting to save the boy at the pool:

"...I told him that if his intention by jumping in the pool was to get him a [commendation] that he's not going to get one, and that he

> should be disciplined for leaving his assignment."

Chief Stephens had a prejudice against Petitioner because of Petitioner's exercise of his constitutional right to free speech, and in particular because of the deposition against him and the clique, and Petitioner's testimony against the clique in the court subpoena compensation scam and speaking out against his promotion to captain. Chief Stephens controlled and dominated the promotion process, and made unilateral changes and modifications to block Petitioner's promotion as recited herein.

On February 17, 1990, when Petitioner realized that he was supposed to be number one on the real promotion list, Petitioner promptly notified Mayor Daddona, and advised him that Petitioner was being retaliated against by Stephens because

Petitioner had testified favorably for Daddona, and contrary to Stephens as requested by Daddona's lawyer, Robert Hanna, Esquire. Despite actual knowledge of Chief Gable that Wayne Stephens was a member of the clique -- despite actual knowledge that Wayne Stephens was found guilty by a jury as an officer who engaged in police brutality -- despite actual knowledge that Wayne Stephens was identified by Chief Gable as a person who was falsifying court subpoena cards in order to obtain compensated time from the City -- despite the fact that Assistant Chief Monaghan identified Wayne Stephens as a member of this clique -- despite the fact that Mayor Daddona's lawyer assured Petitioner that Petitioner could truthfully testify at a deposition without fear of retaliation about Stephens propensity to engage in police brutality,

his propensity to refer to African Americans as "niggers" and his involvement in the clique, Mayor Daddona appointed Stephens as Chief of Police, and then ratified his retaliatory conduct against Petitioner by failing to address the issues raised in Petitioner's letter of February 17, 1990.

Mayor Daddona confirmed and ratified Chief Stephens retaliatory campaign against Petitioner by permitting him to alter unilaterally General Order 309, and use subjective procedures in lieu of objective procedures required by documented, written procedures. The simple fact is that Petitioner is the only person who passed the test with the requisite score of 71.89%, and the promotion list for Sergeant should have only indicated Petitioner, or his brother, Thomas Houck if one rounds the score to

the nearest whole number. Mayor Daddona did not appoint Petitioner as a Sergeant. He did not appoint Petitioner's brother as a Sergeant. Persons who failed the objective test -- and therefore should have been declared ineligible -- received the promotions instead of Petitioner or Petitioner's brother because of the unilateral ex post facto changes and the incorporation of strictly subjective evaluation criteria instead of documented written evaluations as required by the City's own policies. Hence, Mayor Daddona, the Chief, and the City deprived Petitioner of his first amendment constitutional right of free speech.

Upon these facts, the District Court granted Defendants'/Respondents' motion for summary judgment. Plaintiff/Petitioner respectfully seeks review by this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in this case under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a federal court appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

1) Whether or not the Court of Appeals for the Third Circuit erred as a matter of law in affirming the trial court's order of summary judgment in favor of Respondents/Police Officers, where the district court accepted Respondents' hotly contested, self-serving oral version of the facts with no supporting written documentation and disregarded Petitioner's/police officers substantial evidence supporting Petitioner's claims pursuant to 42 U.S.C. Section 1983?

1. In order to prove his claim under Section 1983, Petitioner must show, in essence, that a state actor caused a civil rights violation and that the violation was not the result of mere negligence on the state actor's part. See, Daniels v. Williams, 474 U.S. 327, 330-31 (1986); Jane Doe A v. Special School District of St. Louis County, 901 F.2d 642, 646 (8th Cir, 1990); D.T. by M.T. v. Independent School District No. 16, 894 F.2d 1176, 1193 (10th Cir.), cert denied, _____ U.S. _____, 111 S.Ct. 213

(1990; Metzger by and through Metzger v. Osbeck, 8841 F.2d 518, 520 n. 2 (3d Cir, 1988); Williams v. City of Boston, 784 F.2d 430, 433-34 (1st Cir, 1986); Grubbs v. Aldine Independent School District, 709 F.Supp. 127, 129 (S.D. Tex. 1989); Thelma D. v. Board of Education of the City of St. Louis, 669 F.Supp. 947, 949 (E.D, Mo. 1987).

Applying this standard to the case at bar, Petitioner clearly established Petitioner's Section 1983 claim. At very least, genuine issues of material fact exist concerning Petitioner's claim precluding summary judgment.

The District Court erred as a matter of law in granting Respondents' Summary Judgment motion. The core of Respondents' defense is that Respondent orally changed a written order taking Petitioner from first to last on the list of candidates

for promotion. Petitioner contests that Respondents ever changed the written procedure which placed Petitioner first on the list of candidates for promotion. Respondents' belated claim is merely an after-the-fact attempt to cover up the true, discriminatory reason for refusing to promote Petitioner. Despite the fact that Respondents presented no written evidence of the alleged oral change of the written order, the District Court accepted Respondents' unsupported, oral version of hotly contested material facts. Hence, Petitioner respectfully requests that this Honorable Court enter a writ of certiorari.

2. Petitioner presented substantial evidence to support Petitioner's Section 1983 claim that Respondents intentionally deprived Petitioner of Petitioner's constitutional rights. No dispute exists

that Petitioner's First Amendment rights are implicated by Respondents' retaliatory actions. Rather, the District Court concluded that Respondents' actions did not proximately cause Petitioner's damages.

a. No dispute exists that Petitioner scored the highest in Respondents' written examination placing Petitioner at the top of a list of candidates for promotion. Please see, e.g., Order of May 5, 1992, page 4.

For the reasons set forth below, Respondents' actions resulted in Petitioner's constitutional deprivations. At very least, genuine issues of material fact exist concerning Respondents' alleged oral change of the written rules.

b. At all pertinent times, General Order 309 contained the written procedure which Respondents were required

to follow for promoting officers. For the sake of brevity, Petitioner herein incorporates Petitioner's Statement of Facts (above) as if fully set forth at length. Despite Petitioner's documented evidence of General Order 309 which placed Petitioner first on the list of candidates, the District Court adopted Respondents' contradicted version of facts. Hence, the District Court should have denied Respondents' Motion for Summary Judgment.

3. In its Memorandum and Opinion, the trial court made crucial findings of fact against the moving party, and contrary to the evidence when viewed in a light most favorable to the non-moving party. See, e.g., Tigg Corp. v. Dow Corning Corp., 822 F.2d 358 (3d Cir, 1987).

The factual findings are as follows:

A) "...no one knew what those appendices are..." [referring to Exhibits G and H of General Order 309. Footnote 5 of Memorandum Opinion. That is not factually correct. Chief Stephens testified that he knew what the exhibits were, and they were in the Respondents' exclusive control and possession. Furthermore, Chief Stephens represented that they would be produced. The failure of Chief Stephens to produce the exhibits--and Officer Houck's representation that they were identical to the job evaluation forms used by the City--establishes the fact that Exhibits G and H were written evaluation forms as postulated by the Petitioner.

B) "This procedure was also changed at the above-described meeting of police and F.O.P. officials at the request of the F.O.P." Page 5 of Memorandum

Opinion. 1). It is factually accurate that Monaghan testified that there was such a change. That fact, however, has always been in dispute and the City never produced any writing confirming this change, and the existence of such a change is expressly disputed by Petitioner. In addition, the simple fact is that there was never such a change requested by, acquiesced in, or approved by the F.O.P., and this purported "oral" change to General Order 309 was pretextual and an after-the fact rationalization to cover up the retaliatory conduct by the Respondents. It is undisputed that Petitioner was on the top of the list after the objective portion of the test. Solely using the "oral" interviews could not sabotage Petitioner's promotion because that constituted only 15% of the final score. The Respondents, Stephens

and City of Allentown, needed to increase the "subjective oral" evaluation to 30% in order to take Petitioner from the top of the list to the bottom of the list. That is why the Respondents manufactured the claim that the F.O.P. authorized these oral modifications to General Order No. 309. Such oral modifications did not happen, and the Respondents fabricated the claim to retaliate against Petitioner.

C) "It is clear, however, that Ms. Winters was concerned about Plaintiff's sick time record and this is why the 6 was changed to 4..." Page 9 of Memorandum Opinion. Again, it is not disputed that the pretext for convicting Ms. Winters to change her score was a claim that Petitioner was a "sick leave" abuser. The truth, however, is that Petitioner was not a sick leave abuser, and the false claim that he was is

evidence of the retaliatory conduct of Respondents, Stephens and City of Allentown. The Respondents made a false claim--that Petitioner was a sick leave abuser--in order to stack the oral interview process against Petitioner. That was the mechanism by which Respondents retaliated against Petitioner. Respondents did not tell Winters that Petitioner must be punished for exercising his right to free speech. Instead, Respondents, Stephens and City of Allentown retaliated against him by falsely accusing him of being a "sick leave" abuser in order to deny him the promotion he deserved. Again, the Respondents have produced no documentary evidence to corroborate their false claim that Petitioner was a sick leave abuser because no such documentary evidence exists.

4. Disputed issues of material fact preclude summary judgment in this case. Obviously, if the jury believes the facts as presented by Respondents, Stephens and City of Allentown, Petitioner would lose. On summary judgment, however, the trial court erred as a matter of law in deciding these crucial facts against the Petitioner because there is evidence that: 1) the changes to scrap the written evaluation process were unilateral and were not requested by or approved by the F.O.P.; 2) the job performance evaluation involved written evaluations, and written evaluations were never done; and 3) Petitioner was not a "sick leave" abuser and the attempt by the Respondents to portray him as such were false, and were pretextual.

The District Court erred as a matter of law in finding undisputed facts in a

light most favorable to the moving party when Petitioner's evidence clearly indicates otherwise.

5. The Court of Appeals erred as a matter of law in affirming the District Court Order. In a memorandum Opinion dated February 26, 1993, the Court of Appeals explained, in detail, the factual basis for Petitioner's claim that Defendants denied Plaintiff a promotion to Sergeant in the Allentown Police Department because Petitioner testified against Wayne Stephens and others, in the case of Bennis v. Gable, 823 F2d 723 (3rd Cir, 1987). In addition, the Court of Appeals noted that there was some proof of the accuracy of this claim:

> "We cannot avoid some lingering concern that there may be some basis for Houck's version of the events. However, under the applicable rules and procedures, Houck has an obligation to produce

> admissible evidence to support his claim at the summary judgment stage. As noted, he has failed to do so."

The Court of Appeals correctly noted that a public employee claiming retaliation for exercise of free speech has a dual burden: engage in constitutionally protected conduct, and that such conduct was a "substantial" or "motivating factor" in the government's decision. Rode v. Dellarciprete, 845 F2d 1195 (3rd Cir, 1988).

Obviously, testifying in a Federal proceeding as a witness is constitutionally protected conduct. The Court faulted Petitioner for failing to provide admissible evidence that this constitutionally protected conduct was a "substantial" or "motivating factor" in this government's decision.

In order to reach this result, this Court of Appeals disregarded its own en banc determination in Chipollini v. Spencer Gifts, Inc., 814 F2d 893 (3rd Cir, en banc, 1987), cert dismissed, 483 U.S. 10152 (1987) where the Court discussed, at length, the employees breach at the summary judgement stage on the issue of "pretext".

Here is the reality. General Order 309 was substantially changed, without any documentation of this fact, and without notice to Petitioner and the other persons who were participating in the "oral interview" process and the "written evaluation process." **Information about this "charge" only came about in response to Petitioner's claim.** In response to this lawsuit, Respondents articulated a legitimate business reason for changing the written evaluation process into

another "oral evaluation" process not using the supervisor:

> "THIS WAS DONE AT THE REQUEST OF THE F.O.P. BECAUSE THE SUPERVISORS WERE USING DIFFERENT STANDARDS TO EVALUATE THEIR PATROLMEN".
>
> See, Page 4 of Memorandum Opinion.

If that claim is factually accurate, then there would be a legitimate business for doing it. If that claim is not factually accurate, then the proffered reason is PRETEXTUAL the existence of the change and is circumstantial evidence that the change was initiated in order to facilitate the control and domination of the process by Chief Stephens.

Is there any evidence in the record that the factual determination made in the Memorandum Opinion is correct? Assistant Chief Monaghan claimed that the F.O.P. wanted this change, and the reason the

F.O.P. wanted it was because of "uneven" evaluations by supervisors. Obviously, Assistant chief Monaghan's statements are hearsay, and are not admissible to prove the fact that the F.O.P. wanted the change. See, Rule 801 of Federal Rules of Evidence. See, Inventive Music Lts. v. Cohen, 617 F2d 29 (3rd Cir, 1980) where Court ruled that statement of declarant offered for truth of content was clearly inadmissable hearsay.

Did the Respondents put this fact into issue by the "hearsay" claim of Assistant Chief Monaghan? Hearsay is not admissible because it does not prove the facts of the assertion. See, New England Mutual Life v. Anderson, 888 F2d 646 (10th Cir, 1989). The Respondents were the moving parties on this motion for summary judgment. If Respondents wanted this "fact" into evidence, they could have

taken depositions of F.O.P. officers who allegedly solicited the change.[1]

Respondents did not do so. Instead, Respondents succeeded into getting into the record this important "fact" for which there is no support in the record EXCEPT the hearsay claim by Assistant Chief Monaghan that the F.O.P. solicited the charge. In addition, this fact is inconsistent with the other record evidence as found by this Court, namely, the written "...policy was drafted with the consent of the F.O.P., which was concerned about the lack of a formal promotion policy." Memorandum Opinion, page 2. If the F.O.P. wanted the written

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[1] Remember, this is a case where a police officer claims loss of a promotion because he testified against Wayne Stephens. Petitioner was not in a position to get other officers to testify against Chief Stephens. As the non-moving party, the burden of proof of this fact ought to be in the Respondents.

policy, why scuttle it by immediately requesting "oral" changes?

Again, the Third Court used hearsay--contradicted by the direct evidence of Petitioner--and makes a crucial finding of fact. There is no question that Assistant Chief Monaghan was claiming that Petitioner was a "sick leave abuser". There is no question that this claim was specifically discussed with Jill Winters at the oral interview process, and had an impact on her.

Petitioner postures that this is proof of the pretextual nature of Respondent's claim. Petitioner took an affidavit swearing that he had very few "sick days". The Court of Appeals noted that there is support in the record for Petitioner having the "second highest number of sick days", See Memorandum Opinion, page 8. Where is the support in

the record? The Court confuses the support in the record for the fact that Respondents were making that claim with the reality that Petitioner contradicted by direct evidence (person knowledge) that he was not a "sick day abuser."

That single fact--Petitioner a sick leave abuser?--was capable of objective evidence. The personnel department could have done a calculation and produced documentation of Petitioner's actual "sick days" record vis-a-vis all other candidates for promotion. Respondent was the moving party. It never introduced the reality of Petitioner's attendance record into evidence and inexplicably converted its "hearsay" claim that Petitioner had this "second highest number of sick days" into an objective fact! Where is the objective evidence of this fact? The only non-hearsay evidence is offered by

Petitioner who gave an affidavit indicating that he was not a sick leave abuser, and Stephens and his appointed committee were falsely making that claim about him. That fact was never contradicted by Petitioner's personnel record, yet the trial court and Appellate Court found as a fact Respondent's false claim that Petitioner had the second highest sick day claim of all applicants!

This case is in the exact procedural posture of Chipollini v. Spencer Gifts, Inc., supra. The Petitioner proved that he engaged in constitutionally protected conduct. The Petitioner proved that there was an objective written procedure for promotion. The Petitioner proved that he was number one on the list after the written test. The Petitioner further contended that Chief Stephens unilaterally changed the written system to make 30%

subjective oral evaluation. Even with that change, Respondents still had to make false claims of "sick leave abuse" against Petitioner to get him from the top of the list to the bottom of the list!

Respondents concede that this General Order 309 was changed, but argued that it was done bilaterally, not unilaterally, at the request of the F.O.P. Petitioner claims pretext! If the F.O.P. made the request, where is the admissible evidence from the F.O.P. which confirms the bilateral change? If the F.O.P. made this request, where were the admissible business records which document the change? There is no such admissible evidence from the F.O.P. there are no such bilateral changes. PRETEXT. The Petitioner proved pretext because 1) the Respondents conceded violating General Order 309 (the written promotion policy),

and 2) Respondents never produced admissible evidence supporting their claim that the changes were made at the request of the F.O.P. and instead relied solely upon the hearsay conclusory claim by Assistant Chief Monaghan that the F.O.P. wanted to scuttle the written regulations which it had lobbied for!

Again, in Chipollini v. Spencer Gifts, Inc., supra, the Third Circuit Court held that rebutting the reasons proffered by the employer was sufficient to deny summary judgment, and the employee did not have to specifically relate the pretext to age discrimination. It was pretextual, then an inference could be made that the pretext was made to cover-up illegal age discrimination. The same approach ought to be true for public employees who testify in Federal Court against their supervisors, and then are

subject to retaliatory employment decisions.

The public policy of requiring public employees to specifically relate the pretextual explanation to retaliatory motive is to send a message to all public employees that they are at serious risk for testifying against their supervisors. The decision by the Appellate Court in this case must necessarily have a "chilling impact" upon the exercise of the free speech by public employees, who serve in subordinate positions.

The Circuit court conceded that "...there may be some basis for Houck's version of the events." The Petitioner's version is well documented. He was number one on the list after the written test. There was a written General Order 309 which described how promotions would be handled. He thought he was competing for

the promotion under the written procedures. In the course of this litigation, Petitioner learned that he did not get the promotion because Chief Stephens changed the written procedures, and Assistant Chief Monaghan was claiming that he was a sick leave abuser. The Respondents' version is the undocumented version: 1) where is the evidence from the F.O.P. that it wanted the written evaluation process scrapped and supervisors taken out of the loop?; and 2) where is the evidence that Petitioner was a sick leave abuser? It is not because the moving party did not produce it, and could not produce it. Applying the approach used in Chipollini v. Spencer Gifts, Inc., supra, the issue of pretext creates a genuine issue of material fact which carries this case to the jury, and defeats summary judgment.

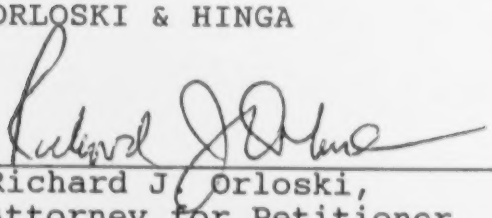
Hence, Petitioner respectfully seeks review by this Honorable Court of the order granting summary judgment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully seeks a Writ of Certiorari to this Honorable Court.

Respectfully submitted,

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1669

WILLIAM A. HOUCK

V.

WAYNE T. STEPHENS; JOSEPH S. DADDONA;
CITY OF ALLENTOWN

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by Appellant William A Houck in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/S/ Sloviter, Chief Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1669

WILLIAM A. HOUCK,
Appellant

v.

WAYNE T. STEPHENS; JOSEPH S. DADDONA;
CITY OF ALLENTOWN

On appeal from the United States
District Court for the Eastern
District of Pennsylvania
(D.C. Civil No. 90-05572)
District Judge: Hon. E. Mac Troutman

Argued February 22, 1993

Before: SLOVITER, Chief Judge, MANSMANN
and SCIRICA, Circuit Judges

(Opinion filed Feb. 26, 1993)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Chief Judge.

Plaintiff William A. Houck, a patrolman with the Allentown Police

Department, brings this action pursuant to 42 U.S.C. Section 1983 (1988) against the City of Allentown, its Mayor, Joseph S. Daddona, and its Chief of Police, Wayne T. Stephens, alleging that he was denied a promotion to the position of sergeant in retaliation for exercising his First Amendment right to criticize the department and certain of its officers. Houck appeals from an order of the district court granting summary judgment in favor of the defendants.

I.

Houck was first hired as a patrolman with the Allentown Police Department in 1974. Approximately ten years later, Houck played a role in speaking out against the activities of certain members of the Department with respect to their scheme to falsify court subpoena forms. Mayor Daddona demoted four policemen from

sergeant to patrolman, relying on the recommendation of Police Chief Carson Gable, but ultimately promoted the fifth, Lieutenant Wayne T. Stephens, to Captain in 1984 and to Chief of Police in 1987.

Houck testified on behalf of the defendants, including Mayor Daddona and the City of Allentown, in a federal court action filed by two of the demoted officers. See Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987). He circulated a petition calling for a special meeting of the Fraternal Order of Police (FOP) to contest the promotion of Stephens, and contested the lack of a formal promotions policy within the department. Houck alleged in his complaint that Stephens confronted him after the meeting and threatened him for opposing his promotion.

In 1988, the Allentown Police Department established a formal written

policy concerning the promotion of its officers known as General Order 309. The policy was drafted with the consent of the Fraternal Order of Police (FOP), which was concerned about the lack of a formal promotions policy. However, the applicable Pennsylvania statute, 53 Pa. Cons. Stat. Ann. Section 37002 (Purdon Supp. 1992), makes the mayor the sole authorized decision-maker on promotions and demotions. Therefore, Mayor Daddona was not required to accept the recommendations as to promotion made by the department.

General Order 309 requires the department to consider the following factors in recommending officer promotions, and specifies the weight for each: a written examination (65%), an oral interview (15%), a departmental evaluation (15%), and seniority (5%).

Section IV of General Order 309 provides more detailed information on each of these steps. With regard to the written examination, the Order specifies a minimum passing grade of 70%. It also provides that "[a] different minimum passing grade may be adopted if the problems of establishing a meaningful eligibility list and test norms warrant it." App. at 156.

In January 1990 Houck and approximately twenty-five other patrolmen took a standardized written examination for promotion to the positions of investigation sergeant and patrol sergeant. None of the candidates received a passing grade of 70%, although Houck scored highest with 66.89%. Houck also was entitled to the maximum score of 5%

for his seniority with the department.[1]

Because General Order 309 provided that no candidate would be eligible for a promotion who had not received a passing grade of 70%, Chief Stephens, Deputy Chief Harold Boyer, Assistant Chief Gerald Monahan, FOP President Paul Snyder, and FOP Solicitor Aaron Matte met to consider modification of the procedures specified in the Order. The group decided that the minimum passing grade for the written exam would be the average of all test scores, which was calculated to be 55.52% in order to establish a meaningful pool of

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[1] Houck asserts that he was the only candidate to pass the written exam with a score of 71.89%. He reaches this figure by adding is 5% for seniority to his exam score of 66.89%. Nothing in General Order 309 requires such a calculation to determine whether an officer received a passing grade on the written exam. In any event, the Order clearly states that the grading scheme may be modified to achieve a meaningful eligibility list.

candidates to interview for the sergeant positions. At the same meeting, that group also decided to alter the grading scheme for the oral interview component from a scale of 0-100 (multiplied by 15% to reflect the weight given to the interview in reaching the total promotion score) to a scale of 0-15.

A substantial change was also made to the departmental evaluation segment of the promotions procedure. General Order 309 provided that the Chief of Police, one Assistant Chief, two Captains, and the officer's primary supervisor were to conduct a "job evaluation which examines work performance, reliability and job knowledge." App. at 157. The candidate's score was to be determined by averaging the middle three evaluations once the high and low scores were discarded. This procedure was modified in several ways.

First, the candidate's primary supervisor was removed from the list of individual conducting the evaluation. This was done at the request of the FOP because the supervisors were using different standards to evaluate their patrolmen. Second, it was determined that the evaluators would reach an oral consensus concerning a particular candidate's score rather than follow the more structured procedure specified in the Order. Third, Deputy Chief Boyer would be substituted for a police captain as an evaluator on the panel, and the new scale of 0-15 for the oral interview would also be used in the departmental evaluation.

Houck and thirteen other candidates were interviewed under these revised guidelines by Stephens, Boyer, and Monahan, as well as Thomas Murphy, the Commissioner of the Bethlehem Police

Department, and Jill Winters, a labor relations assistant with the City of Allentown's Personnel Office. Houck fared poorly in his interview. He also received only two out of a maximum of fifteen points on his performance evaluation. As a result, he was ranked last on the final promotion list.

Houck was notified of his scores on January 29, 1990. On February 17, 1990, his attorney wrote a letter to Mayor Daddona, alleging that Houck's poor performance on the oral and evaluative portions of the promotions procedure was the result of Chief Stephens's retaliation against Houck for opposing the clique of officers involved in the subpoena scandal. Mayor Daddona asked Thomas Anewalt, Allentown's Solicitor, to investigate Houck's allegations. Anewalt concluded that Houck's charges were without support

and that the failure to recommend a promotion was based on Houck's performance record, which included his excessive use of sick leave.

Houck then filed this action in federal district court. Depositions were taken of all of the individuals who participated in reviewing Houck's candidacy for promotion to sergeant. Thereafter, defendants filed a motion for summary judgment on the ground that nothing in the record demonstrated that Daddona or Stephens reduced Houck's scores in retaliation for exercising his First Amendment rights, which the district court granted.

II.

We exercise plenary review of the grant of a motion for summary judgment and apply the same standard utilized by the district court. Colburn v. Upper Darby

Township, 946 F.2d 1017, 1020 (3d cir. 1991). We review the record to determine whether the moving parties have demonstrated that there is no genuine issue of material fact. Id. "Where a party opposing a motion for summary judgment has the burden of persuasion, and the moving party has identified sufficient facts of record to demonstrate that no genuine issue of material fact remains, the nonmoving party is obliged to identify those facts of record which would contradict the facts identified by the movant." Childers v. Joseph, 842 F.2d 689, 694-95 (3d Cir. 1988).

III.

Our evaluation of Houck's claim of retaliation based on the exercise of protected constitutional rights follows well-settled principles. As we recently noted in Rode v. Dellarciprete, 845 F.2d

1195 (3d Cir. 1988), although government employment does not require an employee to completely forgo the exercise of the right to freedom of expression, "[e]mployees who claim that adverse employment action was taken against them based upon the exercise of this right bear a dual burden. They must show that they were engaged in constitutionally protected conduct and that the conduct was a 'substantial' or 'motivating factor' in the government employer's decision." Id. at 1200 (quoting Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)); see also Czurlanis v. Albanese, 721 F.2d 98, 103 (3d cir. 1983).

Defendants concede that Houck's activity in protesting Chief Stephens's promotion and in testifying before City Council and in federal court were constitutionally protected. Instead, they

argue that Houck failed to produce any evidence to meet his burden of persuasion that the exercise of his First Amendment rights was a substantial or motivating factor in his failure to receive a promotion to the rank of sergeant.

In their motion for summary judgment, the defendants pointed to affidavits and deposition testimony that (1) General Order 309 was modified for reasons of administrative convenience and was not altered as a means of thwarting Houck's promotion, and (2) Houck's oral interviews and performance evaluations were based on Houck's record unrelated to his First Amendment activities.

As we made plain in Schulz v. Celotex Corp., 942 F.2d 204 (3d Cir. 1991), where the moving party has pointed to evidence in the record that no factual issues exist, "the non-moving party must specify

the portions of the record that would contradict the allegations supporting the motion. The burden is on the non-moving party to search the record and detail the material controverting the moving party's position." Id. at 210.

A.

The gist of Houck's claim against Chief Stephens is that he orchestrated a conspiracy to retaliate against Houck for his acts of protest more than five years earlier. According to Houck, "Chief Stephens controlled and dominated the promotion process, and made unilateral changes and modifications to block [the] promotion." Appellant's Brief at 22. Yet Houck points to nothing in the record to refute the statement by Assistant Chief Monahan that the modifications to General Order 309 were initiated by and implemented with the consent of FOP

officials as a means of simplifying and making more fair the evaluation process.

Nor has Houck identified any deposition testimony or affidavit other than his bare allegations of misconduct to support his assertion that Stephens manipulated the scores of those participating in the oral interviews. Instead, the record shows that Commissioner Thomas Murphy and Jill Winters, who were not members of the Allentown Police Department, both gave Houck extremely low scores for his interview. Support for these low marks are found in Houck's record of having the second highest number of sick days in the department over a four-year period, the lowest response rate to assigned calls, and numerous reprimands.

Houck argues that this court should infer from the decision to supplant the more formal evaluation procedure specified in General Order 309 with an oral consensus approach that Chief Stephens was exercising his power to block Houck's promotion. Even if written evaluations were required under the earlier version of the Order, a matter which is unclear from the Order itself but which we assume arguendo, Houck has not proffered any evidence to show that the modification was designed to facilitate Chief Stephen's ability to retaliate against Houck for opposing Stephen's promotion in 1984.

Since Houck has pointed to nothing in the record to support his allegation that his failure to receive a promotion was in any way related to his exercise of first Amendment freedoms, it follows that the district court did not err in granting

summary judgment in favor of Chief Stephens.

B.

In light of our disposition of Houck's claim against Chief Stephens, Houck's allegations against Mayor Daddona and the City of Allentown must also fail. As we stated in Rode, "[a] defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated on the operation of respondeat superior. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." 845 F.2d at 1207 (citations omitted).

At his deposition, Houck candidly admitted that Mayor Daddona's refusal to promote him was not motivated by a desire to retaliate against him for his 1985 deposition testimony (which in fact was in

favor of Daddona) or for his 1984 petition to the FOP concerning Chief Stephens. He also stated that "I don't know whether he had direct knowledge . . . but I can only assume that since he is Wayne Stephens' boss that everything that . . . Wayne did was with his approval." App. at 165. Finally, Houck points to nothing in the record to refute Daddona's affidavit that he had no knowledge of whether Houck was not recommended for a promotion because of his acts of protest. Therefore, summary judgment in favor of Mayor Daddona was properly entered.

Since Daddona cannot be liable under section 1983, it follows a fortiori that the City of Allentown is free from liability as a matter of law. In Bennis v. Gable, 823 F.2d 723 (3d Cir. 1987), a section 1983 action against the City of Allentown, Mayor Daddona, and then-Police

Chief Gable based on the demotion of two Allentown police sergeants, we stated:

> It is undisputed that the City's sole authorized decision maker on promotions and demotions within the police department is the mayor, and therefore if Daddona is ultimately held liable the City may be held liable as well. On the other hand, if only Gable and not Daddona is held liable, then the City may not similarly be held liable.

Id. at 733 n.11 (citations omitted).

IV.

We cannot avoid some lingering concern that there may be some basis for Houck's version of the events. However, under the applicable rules and procedures, Houck has an obligation to produce admissible evidence to support his claim at the summary judgment stage. As noted, he has failed to do so.

For the foregoing reasons, we will affirm the order of the district court granting summary judgment in favor of all defendants.

TO THE CLERK:

Please file the foregoing opinion.

/S/ Sloviter, Chief Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. HOUCK,	)	CIVIL ACTION
	)	
	)	NO. 90-5572
Plaintiff	)	
	)	
vs.	)	
	)	
WAYNE T. STEPHENS, JOSEPH DADDONA, and the CITY OF ALLENTOWN,	)	
	)	
Defendants	)	

TROUTMAN, S.J.

M E M O R A N D U M

Before the court is plaintiff's motion for reconsideration of our memorandum and order dated May 4, 1992, which granted defendants' motion for summary judgment. In our memorandum, we explained that "[b]ecause we conclude that the plaintiff has failed to establish sufficient evidence to defeat the defendants' motion, the motion for summary

judgment will be granted." (Memorandum Opinion at 1-2.) We concluded that

> "[i]n short, defendants have shown evidence that no retaliation was ever intended, or even if intended, that plaintiff's failure to be promoted was not caused by any such retaliation. Plaintiff has failed to produce any evidence, direct or even circumstantial, other than his own statements and conclusions, to support his claim and thus defeat the defendants' motion.

(Id. at 9-10.) Plaintiff's motion for reconsideration does not persuade us to alter our earlier decision.

Plaintiff's motion argues that we made "crucial findings of fact against the [non-]moving party, and contrary to the evidence when viewed in a light most favorable to the non-moving party." (Plaintiff's Motion for Reconsideration at page 1.) Plaintiff specifically cites three such instances: (1) General Order 309 was not unilaterally changed, but

changed with the approval of the F.O.P.; (2) the "job" evaluations were not "written" evaluations and no one knew what appendices G and H were; and (3) plaintiff was a "sick time" abuser. In addition, plaintiff, along with his motion, has now filed complete copies of all depositions. Plaintiff once again has not cited to specific evidence of record, which is contrary to defendants' evidence, as he must do under Fed. R. Civ. P. 56(e) in order to defeat defendants' motion.

As to the plaintiff's first point, plaintiff's motion repeats the same fatal mistake, i.e., he has simply asserted conclusory allegations to make an issue of fact. It still remains that the deposition of Assistant Chief Monaghan is still uncontroverted. Further, contrary to plaintiff's argument in his motion for reconsideration, this fact was not

disputed at the summary judgment stage, and although plaintiff asserts that there never was a change requested, acquiesced, or approved by the F.O.P., there is still no dispute regarding the change; plaintiff has no pointed to record evidence to dispute Monaghan's statement.

As to plaintiff's second point, regardless of whether there is some sort of dispute about this issue, it was not material. Nonetheless, although we believe the footnote at issue is self explanatory, we will attempt to clarify. We used the term "job" evaluations, not "written", simply because General Order 309 uses the term "job" evaluations. The term "written" evaluations was used in the arguments of the parties and was thus used loosely; we simply used the same term as in General Order 309 itself. The footnote

plaintiff cites was intended to clarify why we used a "new" term. In addition, we did not find that no one knew what "appendices G and H" were. We stated:

> Since we do not know, and it appears from the depositions that no one knew, what those appendices are, we presume they are job evaluation forms, similar to the performance review of plaintiff attached to his Affidavit in Opposition, Exh. "O", and that is how the "written" evaluation came into the discussion.

(Memorandum Opinion at 5, n.5 (emphasis added).) Perhaps we should have added, "came into the discussion and arguments of counsel." Clearly, we did not find a fact unfavorable to plaintiff, rather to the contrary, and we simply explained the term "job" evaluation as used in the Memorandum.

As to plaintiff's final point, we did not find that plaintiff was a sick time abuser. Plaintiff's argument was, and

still is, that Chief Stephens sabotaged plaintiff's oral interview by prejudicing Ms. Winters' opinion of plaintiff by accusing him of being a sick time abuser. What we did find was that "no prejudicial statements were made, or discussions had, to the outside evaluators in the oral interview panel". (Memorandum Opinion at 9.) Although the testimony showed that certain information about all the candidates was made available prior to the interview, including sick leave and worker's compensation, there was no evidence offered to show, or from which it could be inferred, that this was done to direct prejudice at the plaintiff, or that the information was incorrect, or tainted, etc. Thus, we stated: "Quite simply plaintiff has not pointed out any statement in Ms. Winters' deposition that she changed the score due to Chief

Stephens[']s influence...." Plaintiff has still not brought to our attention any evidence to the contrary or to support his position that the oral interview was sabotaged.

When we outlined the standards by which we review motions for summary judgment, we stated

> In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument that the record somehow contains facts sufficient to support its claims.[1] Childers v. Joseph,

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[1] We noted above that plaintiff has now filed the entire transcripts of all the depositions in this matter, thus appearing to argue, without stating as such, "that the record somewhere contains facts sufficient to support [his] claims." Plaintiff has not, however, directed our attention to any portion of those transcripts to support his position, and it is not our duty to review those transcripts for such statements. Childers v. Joseph, 842 F.2d 689, 695 (3d Cir.

> 842 F.2d 689 (3d Cir. 1987). Instead, the party resisting the motion for summary judgment is required to identify specifically the evidence of record which supports the claim and upon which a verdict in its favor may be based. Id.

(Memorandum Opinion at 7 (footnote added).) Plaintiff has not argued that we applied the wrong standard. We thus conclude, once again, that plaintiff has failed to meet his burden under Fed. R. Civ. P. 56(e) to cite evidence contradictory to defendants and which could support a verdict in his favor.

1987).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. HOUCK,	)	CIVIL ACTION
	)	
	)	NO. 90-5572
Plaintiff	)	
	)	
vs.	)	
	)	
WAYNE T. STEPHENS, JOSEPH DADDONA, and the CITY OF ALLENTOWN,	)	
	)	
Defendants	)	

TROUTMAN, S.J.

M E M O R A N D U M

Defendants, Wayne T. Stephens, who is the Chief of Police of Allentown, Joseph Daddona, who is the Mayor of Allentown, and the City of Allentown, have filed a motion for summary judgment. Plaintiff, a patrolman for the Allentown Police Department, claims that the defendants violated his constitutional rights, as codified at 42 U.S.C.A. Section 1983, when they failed to promote him to sergeant in

retaliation for the exercise of his first amendment rights. The Court has jurisdiction pursuant to 28 U.S.C.A. Section 1331, and venue is proper since defendants reside in, and the acts complained of, occurred within this district. Because we conclude that the plaintiff has failed to establish sufficient evidence to defeat the defendants' motion, the motion for summary judgment will be granted.[1]

I. BACKGROUND

Plaintiff claims that the defendants, by failing to promote him, carried out a plan to retaliate for his having given deposition testimony against Chief Stephens in an earlier wrongful demotion

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[1] Defendants have also filed a Motion for Leave to File Supplemental Brief (Doc. #20) which, in order to clarify the docket, we will also grant.

case,[2] and for opposing Stephens' earlier promotion to captain (Second Amended Complaint, Paragraph 25). Plaintiff also alleges that the City and the Mayor had a custom or policy of firing or not promoting officers who exercise their right to first amendment free speech (Second Amended Complaint, Paragraph 34).

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[2] The current case appears to be a distant cousin of the earlier demotion case, Bennis v. Gable, 823 F.2d 723 (3rd Cir. 1987). In that case, members of the Allentown Police department brought suit claiming that they were demoted because they opposed the then incoming Mayor, Daddona. The Mayor and then Chief of Police Gable argued that the plaintiffs were demoted because they were members of a disruptive "clique" within the police department and engaged in certain demoralizing and illegal activities. In the current case, plaintiff claims part of the retaliation motivation was because he spoke out against Chief Stephens, and others, including the Bennis plaintiffs, because he was/is a member of the "clique". Legally, this case is a further extension of the cases involving discipline for the exercise of one's constitutional rights, such discipline involving firing, suspension, demotion, and now, failure to promote.

Stephens, as Chief of Police, is one of a handful of people responsible for evaluating and recommending officers to the Mayor for promotion. Stephens does not have any absolute or singular control over who is recommended for promotion. (See, Police Departmental General Order 309, attached as Exh. "L" to Plaintiff's Affidavit in Opposition (Doc. #18)). The Mayor has full and final authority over promotions and need not accept the Police Department's recommendation (Daddona Aff., Exh. "A" to Defendant's Motion for Summary Judgment (Doc. #17), Paragraphs 4, 5).

Plaintiff further alleges that Stephens was/is a member of a "clique" of rogue officers within the department who, inter alia, intimidate other officers and otherwise destroy moral. Plaintiff's affidavit in opposition and brief in opposition detail several conflicts he had

with members of the clique. Other than showing that the clique members are not worthy of wearing a police badge, these factual assertions are unimportant to the instant action. Important to the current issue, however, is what plaintiff has shown, and not shown, regarding the promotion procedure employed by the police department.

The Allentown Police Department implemented, for the first time, in 1990, a written procedure to follow for promoting officers, General Order 309. Plaintiff was one of a number of potential candidates for promotion to sergeant in 1990 and was one of the officers affected by this plan. Because this was the first time General Order 309 was utilized in determining department promotions, certain changes in this written plan had to be made to fairly deal with certain

difficulties not fully anticipated in General Order 309.

General Order 309 provides a four step process to determine the best candidate for promotion: (1) a written exam; (2) an oral interview; (3) a departmental evaluation; and (4) seniority. Under the General Order 309 plan, the written examination counts for 65% of the candidate's final score. A minimum score of 70% on the written test is required for a candidate to be eligible for further consideration. Plaintiff received the highest mark on the written exam; this grade, however, was below the minimum 70%. General Order 309 provides for such an event and allows a different minimum passing grade to be set, although it does not provide by whom it may be set, in order to provide a suitably large

enough pool of candidates.[3] In light of the test results, it was decided that the average score of all the tests would be the minimum passing grade. This decision was made at a meeting of Chief Stephens, Assistant Chief Gerald Monahan, Deputy Chief Harold Boyer, F.O.P. president Paul Snyder, and F.O.P. solicitor Aaron Matte. (Stephens depo., attached as Exh. "B" to Defendants' Motion for Summary Judgment, at 30-39). Plaintiff was thus at the top

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[3] Contrary to plaintiff's argument, nowhere in General Order 309 do we find any requirement that a candidate's seniority points be added to his test score in order to determine whether a candidate received the 70% minimum required. Under plaintiff's reading of General Order 309, he would have been the only person to score over 70%. Even if we accepted plaintiff's argument, General Order 309 nonetheless provides: "A different minimum passing grade may be adopted if the problems of establishing a meaningful eligibility list and test norms warrant it." (General Order 309, art. VI, sec. A.)

of a list of fourteen potential candidates.

The next step in the General Order 309 plan requires an oral interview conducted by the Chief of Police, one Assistant Chief of Police, a third member of the Police Department in the rank of Captain, one member of the Civil Service Board, and one outside ranking police official selected by the Chief. The oral interview as conducted as designed, except that the mathematics of calculating the score was changed in a non-material manner.[4] (Stephens depo. at 54-55).

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[4] Rather than score a candidate on a 100% scale and then average the scores of the individual interview panel members and then multiply by 15 to determine the final weighted score, candidates were given a score between 1 and 15 by each panel member and then these were averaged to arrive at the final weighted score for the oral interview portion of the General Order 309 plan.

The third step in the General Order 309 plan requires the Chief of Police, one Assistant Chief, two captains, and the officer's primary supervisor, to make job evaluations of the candidates.[5] The high and low score would be disregarded and the remaining scores would be averaged to arrive at the job evaluation grade. This procedure was also changed at the above described meeting of police and F.O.P. officials, at the request of the F.O.P., (Monahan depo., attached as Exh. "C" to Defendants' Motion for Summary Judgment,

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[5] Although counsel argue and the depositions discuss "written" evaluations, General Order 309 discusses "job" evaluations without further detail, other than mentioning "appendices G and H. Since we do not know, and it appears from the depositions that no one knew, what those appendices are, we presume they are job evaluation forms, similar to the performance review of plaintiff attached to his Affidavit in Opposition, Exh. "O", and this is how the "written" evaluation came into the discussion.

at 48), so that the officer's supervisor was not a member of the job evaluation panel. This was to eliminate an unfairness since each supervisor gave different numerical ratings to the officers. (Monahan depo., Exh. "C", at 48). The job evaluation panel consisted of Chief Stephens, Assistant Chief Monahan, Deputy Chief Boyer (rather than a captain) and Captain Warkessel. These four met and determined a consensus number score for each candidate. Among the items they considered were the candidates' performance evaluations for the previous three years, as well as platoon evaluations (Monahan depo., attached as Exh. "D" to Defendants' Motion for Summary Judgment, at 5).

The final step under the General Order 309 plan is to assign points for the candidates' seniority. For this,

plaintiff received that maximum allowed - 5 points.

After the completion of the General Order 309 plan, plaintiff was ranked fourteenth, last of all the possible remaining candidates.

II. CONTROLLING LEGAL STANDARDS

Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court's consideration of the facts must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. Tigg Corp. v. Dow Corning Corp, 822 F.2d 358 (3d Cir. 1987).

In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying evidence, from the sources enumerated in Rule 56, which demonstrates the absence of a genuine issue of material fact. In order to defeat summary judgment, the party opposing the motion may not rest upon mere denials of the facts identified by the movant as supportive of its position, nor upon the vague and amorphous argument that the record somewhere contains facts sufficient to support its claims. Childers v. Joseph, 842 F.2d 689 (3d Cir. 1987). Instead, the party resisting the motion for summary judgment is required to identify specifically the evidence of record which supports the claim and upon which a verdict in its favor may be based. Id.

Plaintiff must show that his speaking out against Chief Stephens was constitutionally protected speech and that his speaking out was a substantial or motivating factor for the adverse employment decision. Rode v. Dellarciprete, 845 F.2d 1195 (3rd Cir. 1988). In otherwords, if plaintiff's speech is protectable, then to prevail against the defendants' motion, he must show that his failure to be promoted was the result of retaliation, or was caused by, Chief Stephens. The next step in the inquiry to determine whether the defendants failure to promote the plaintiff was wrongful is to balance the plaintiff's speech interests against the interests of the police department. Id. Because we conclude that plaintiff's speaking out was not a motivating factor to his failure to be promoted, we do not

reach the question whether plaintiff's action of speaking out against Chief Stephens was protectable first amendment speech.

Plaintiff must point to evidence of record that Chief Stephens acted in a manner that was retaliatory, e.g., he unduly and prejudicially influenced the scoring of the other decision makers in the subjective portion of the promotion process, and/or that the alterations made in the promotion process were directed at plaintiff, to show a genuine issue of material fact sufficient to defeat summary judgment. We conclude that plaintiff has failed to produce sufficient evidence that Chief Stephens acted in a retaliatory manner towards plaintiff, or even if he did, Chief Stephens did not cause plaintiff's failure to be promoted.

III. DISCUSSION.

Plaintiff's claim is that Chief Stephens wrongfully altered or refused to follow the mandates of General Order 309 in order to make the evaluations more subjective and was able to influence the decisions of others in their scoring and that he controlled the promotion decision process, (Second Amended Complaint, Paragraph 23): "Chief Stephens controlled and dominated the promotion process, and made unilateral changes and modifications to block Plaintiff's promotion as recited herein." (Plaintiff's Brief in Opposition (Doc #19), at 22). While it is not disputed that the provisions of General Order 309 were altered, first, the evidence clearly shows that those changes were not unilateral, and second, there is no evidence that the changes were wrongfully directed at plaintiff in an

attempt to retaliate against him. Plaintiff has not provided any evidence, direct or indirect, not even a statement or testimony from anyone involved in scoring the subjective portions of the procedure that Chief Stephens influenced their score against plaintiff, sufficient to challenge the defendants' evidence.

The only evidence we received is testimony explaining why certain changes were made, who agreed to make the changes, that no undue influence, wrongful or otherwise, was ever exerted by Chief Stephens, and that no prejudicial statements were made, or discussions had, to the outside evaluators on the oral interview panel (See, e.g., Murphy depo., attached as Exh. "I" to Defendants Motion for Summary Judgment, at 20; Winters depo., attached as Exh. "H" to Defendants

Motion for Summary Judgment, at 17).[6] In

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[6] Plaintiff points out that the only civilian member of the oral interview panel, Jill Winters, apparently first gave plaintiff 8 out of 15 points and then changed the score to 6 and subsequently 4 points. Plaintiff concludes that the Allentown police officers on the interview panel "sabotaged Plaintiff's oral interviews by getting Jill Winters, the only non-police person on the panel, to change her score from an 8 out of 15 to a 4 out of 15 points." (Plaintiff's Brief in Opposition (Doc. #19), at 16). Plaintiff's conclusion has not been supported. Plaintiff attached, as Exh. "P", to his Affidavit in Opposition, a copy of what appears to be notes of the oral interview taken by Ms. Winters. From our review of this exhibit, there could be many reasons why the numbers at the top of the page, accepting that these numbers reflect her score, have been altered, from an error in subtraction to further reflection. It is clear, however, that Ms. Winters was concerned about plaintiff's sick time record and this is why the 6 was changed to 4: "-2 for sick", followed by the changed number. Quite simply plaintiff has not pointed out any statement in Ms. Winters' deposition that she changed the score due to Chief Stephens influence, and in fact, plaintiff does not provide any support for what this document purports to be or any interpretation of what it truly reflect. Plaintiff's conclusions about what the document is, without this support, do not add support to his case.

short, defendants have shown evidence that no retaliation was ever intended, or even if intended, that plaintiff's failure to be promoted was not caused by any such retaliation. Plaintiff has failed to produce any evidence, direct or even circumstantial, other than his own statements and conclusions, to support his claim and thus defeat the defendants' motion.

Finally, since we conclude that Chief Stephens has not violated plaintiff's first amendment rights, there can be no claim against the Mayor or the City. Even if we were to conclude otherwise with respect to Chief Stephens, there simply is no evidence that the Mayor, and thus the City, had any involvement in the events as alleged by plaintiff. See, e.g., Rode, supra. This is confirmed by plaintiff's

own deposition testimony. (See, Defendants' Brief in Support (Doc. 17), at 7-9.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM A. HOUCK,	)	CIVIL ACTION
	)	
	)	NO. 90-5572
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
WAYNE T. STEPHENS, JOSEPH DADDONA, and the CITY OF ALLENTOWN,	)	
	)	
Defendants	)	

TROUTMAN, S.J.

O R D E R

AND NOW, this 4th day of May, 1992, upon consideration of the Motion of Defendants for Leave to File Supplemental Brief (Doc. #20), IT IS ORDERED that said motion is GRANTED.

IT IS FURTHER ORDERED that upon consideration of the Motion of Defendants for Summary Judgment (Doc. #17) and the

response thereto, the motion is GRANTED and judgment is entered in favor of the Defendants and against the Plaintiff.

/S/ E Mac Troutman

S.J.

No. 92-2000 (2)

Supreme Court, U.S.
FILED
JUN 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

WILLIAM A. HOUCK,

Petitioner,

-v-

WAYNE T. STEPHENS, JOSEPH DADDONA and CITY OF ALLENTOWN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Third Circuit err as a matter of law in affirming the trial court's order of summary judgment in favor of the respondents where the petitioner failed to establish that there is a genuine issue of material fact for trial?

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No. 92-2000

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WILLIAM A. HOUCK,

Petitioner,

vs.

WAYNE T. STEPHENS, JOSEPH DADDONA AND CITY OF ALLENTOWN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Joseph Daddona ("Daddona") is the Mayor of the City of Allentown. Wayne T. Stephens ("Stephens") is the City's Police Chief. William A. Houck ("Houck") is a patrolman on the City's police force. In his second amended complaint, Houck alleges that his First Amendment rights were violated by Stephens, Daddona and the City when Houck was not given a promotion to the position of sergeant in retaliation for exercising his First Amendment right to freedom of speech.

Under the Third-Class City Code and under the ordinances of the City of Allentown, Daddona, as Mayor, possesses full and final authority concerning decisions and policies regarding promotions within the Allentown Police Department. The procedure for selecting a candidate for promotion within the Allentown Police Department in January, 1990, was that the department would conduct tests and evaluations of all candidates and make a recommendation to Daddona of those persons to be promoted. Daddona would then make the final decision. Daddona was not bound to accept the department's recommendation of a candidate for a promotion.

The procedure of the Allentown Police Department for conducting tests and evaluations of the candidates for promotion is set forth in the Police Department General Order 309. General Order 309 was written before Stephens became Chief of Police and was accepted by the Fraternal Order of Police ("FOP"). General Order 309 did not take effect until 1990. General Order 309 provides a four-part process for the promotion procedure consisting of: a written examination, seniority, a department evaluation and an oral interview.

General Order 309 provides that the initial step in the procedure is a written examination with a minimum passing grade of 70%. Stephens did not select the written examination or administer the test.

General Order 309 provides that candidates who have not passed the written test are not eligible for further participation in the promotion selection process. However, General Order 309 further provides that a different minimum passing grade may be adopted if problems of establishing a meaningful eligibility list warrant it. In 1990 none of the candidates for promotion to sergeant, including Houck, received the passing grade of 70%.

Because no one had passed the written examination for sergeant, Stephens, FOP President Paul Snyder, FOP Solicitor Aaron Matte, Assistant Police Chief Gerald Monahan and Deputy Police Chief Harold Boyer held a meeting to discuss the procedure to be followed. The decision agreed to at that meeting was that the average score of all the candidates would be the passing grade.

During the same meeting, the departmental evaluation (also referred to by the parties and the lower courts as the written evaluation) portion of the promotion procedure was also modified. General Order 309 provided that the candidates were to be evaluated by the Chief of Police, one Assistant Chief of Police, two Captains, and the candidate's primary supervisor. The final score would be the average of the remaining three evaluations once the high and lower evaluations were excluded. This procedure was modified at the request of the FOP and by agreement by those at the meeting because different shift lieutenants (a candidate's primary supervisor) did not rate their patrolmen on the same basis. The departmental evaluation procedure utilized after the change was that Assistant Chief Monahan, Deputy Chief Boyer, Chief Stephens and Captain Warmkessel reviewed the yearly performance evaluations of the candidates from the previous three years and the evaluations from the platoon and arrived at a consensus number to be given to each candidate.

The oral interview part of the promotion process was also changed at the meeting. Instead of giving a candidate a rating on a score of zero to one hundred and then multiplying that number by 15% as provided in the General Order 309, a candidate was merely given a score from zero to fifteen. Otherwise the oral interview part of the promotion process remained the same.

Therefore, the procedure followed in January, 1990, for recommending candidates to the Mayor for a promotion was a four-part process:

1. A written examination was prepared by and graded by an outside testing agency. This accounted for 65% of a candidate's rating.

2. Seniority accounted for 5% of the candidate's rating.

3. An oral interview accounted for 15%. This was conducted by five persons, including a civilian employee of the City of Allentown and the Chief of Police from the City of Bethlehem, each of whom voted separately, with the high and low scores discarded.

4. A department evaluation accounted for 15%. This involved an evaluation of a candidate's work performance by four of the top-ranking officers of the police department.

Houck applied for a promotion with the Allentown Police Department in January, 1990. Although Houck, along with the other applicants, failed to achieve a passing score on the written exam, he had the highest score of those who took the exam. Houck also received the maximum five points for his seniority with the department. However, Houck fared poorly in the oral interview and received only two out of fifteen points on the department evaluation portion of the promotion process. The sum of all the components to the promotion process — the written test, the oral interview, the departmental evaluation and seniority — placed Houck last on the promotion list. The net result was that of the 28 applicants, 14 of whom were deemed eligible for promotion by reason of their performance on the written examination, Houck was 14th. Thus, when vacancies occurred in 1990 and 1991 for sergeants, the Allentown Police Department did not recommend Houck for promotion to this position. Nor did Mayor Daddona promote him.

Houck claims that he circulated a petition in 1984 protesting

Stephens' promotion to Captain at that time. Daddona was not aware of this incident until after the filing of this lawsuit.

Houck testified in a deposition in 1985 in federal court litigation involving the demotion of certain Allentown police officers. His deposition testimony was critical of Stephens, but favored the position of Mayor Daddona and the City of Allentown in that litigation.

Houck admitted in his deposition that he had never communicated any complaint to the Mayor about promotions in the Police Department. Mayor Daddona first became aware of a complaint when Houck's counsel directed a letter to him on February 17, 1990. This letter does not contain any reference whatsoever to the 1984 incident in which Houck allegedly protested the promotion of Stephens to Captain. The record is devoid of any evidence that Daddona was even aware of this incident. The letter does claim that Stephens was retaliating against Houck for testimony given by Houck in a previous deposition. However, Houck's deposition testimony *favored* Daddona's position in that earlier case.

Following receipt of the February 17, 1990 letter, Daddona asked the City Solicitor to look into the matter. The City Solicitor did so, and reported to Daddona that in his opinion there was no impropriety in connection with the promotion procedure. He also reported to Daddona that Houck had the second highest number of sick days in the Allentown Police Department and that Houck had received numerous reprimands for misconduct, including seven accidents with his cruiser car, interfering with an investigation requested by the District Attorney, making racist comments, and refusing to investigate a knifing.

SUMMARY OF ARGUMENT

This case does not present any issues appropriate for exercise of this Court's discretionary jurisdictional powers. The decision of the Court of Appeals of the Third Circuit affirming the district court's entry of summary judgment in favor of the respondents does not conflict with a decision of any other court of appeals. Rather, the decision is consistent with other case law and is in accord with Rule 56(e) of the Federal Rules of Civil Procedure.

Petitioner has not produced any competent evidence that there is a genuine issue of material fact for trial, as required by Rule 56(e). Respondents are entitled to judgment in their favor based upon the evidence which they produced, and the award of summary judgment in their favor is therefore proper.

REASONS FOR DENYING THE WRIT

I.

HOUCK HAS NOT ESTABLISHED ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW.

The decision of the Court of Appeals for the Third Circuit in this case does not conflict with the decision of any other court of appeals. This case merely concerns whether Houck has complied with the requirement of Rule 56(e) of the Federal Rules of Civil Procedure that he set forth specific facts showing that there is a genuine issue of fact for trial. This case presents no novel questions of law. The decision of the Third Circuit neither departs from the accepted and usual course of judicial proceedings nor does it sanction such a departure by the lower court to call for an exercise of this Court's power of supervision. The Court of Appeals' decision involves no important questions of federal law which

have not been, but should be, settled by this Court; nor does it decide a federal question in a way that conflicts with applicable decisions of this Court.

Houck has stated in his brief that the reason relied upon for allowance of his writ is that the decision of the Third Circuit conflicts with the decision of other federal courts of appeals. However, Houck has not cited a single decision from another court of appeals which is in conflict with the decision of the Third Circuit in this case.

Moreover, the decision of the Third Circuit was rendered in accordance with Rule 56(e). Houck's petition alleges nothing more than his disagreement with the decisions of both the lower courts that he has failed to set forth specific facts, supported by affidavits or depositions, showing that there is a genuine issue of material fact for trial. Houck's failure to produce evidence of such facts, and the findings of the lower courts that Houck failed to do so, do not establish any special or important reasons for the granting of the petition for writ of certiorari. Such issues are within the province of the lower courts, which fully and accurately addressed such issues. The granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 546, 58 S. Ct. 851 (1938).

II.

HOUCK FAILED TO PRODUCE ANY EVIDENCE SHOWING THAT THERE IS A GENUINE ISSUE FOR TRIAL.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(e) does not allow a party resisting a motion for summary judgment to rely merely upon bare assertions, conclusionary allegations or suspicions. *Firemen's Insurance Company of Newark, N.J. v. DuFresne,* 676 F.2d 965 (3d Cir. 1982). "The burden is on the nonmoving party to search the record and detail the material controverting the moving party's position." *Schulz v. Celotex Corp.,* 942 F.2d 204, 210 (3d Cir. 1991). Furthermore, affidavits submitted under Rule 56(e) must be made on personal knowledge by showing that the affiant is competent to testify as to the matters contained in the affidavit. *Grier v. Galinac,* 745 F. Supp. 1058 (M.D. Pa. 1990).

Houck claims that the Third Circuit erred by accepting the respondents' facts and by making findings against him. Houck also claims that disputed issues of fact preclude summary judgment in this matter. However, as found by the courts below, Houck failed to identify any deposition testimony or produce competent and admissible evidence through his affidavit putting into dispute material issues of fact. Rather, Houck merely relies upon his bare suspicions and conclusionary allegations. The Third Circuit exercised plenary review of the record to determine whether there was any genuine issue of material fact and held that ". . . Houck has pointed to nothing in the record to support his allegation that his failure to receive a promotion was in any way related to his exercise of First Amendment freedoms. . . ."

The prime example of Houck's failure to produce any evidence disputing the facts produced by the respondents is Houck's claim that the changes to the promotion procedure were not approved by the FOP. The respondents produced competent evidence by Stephens and Assistant Police Chief Gerald Monahan ("Monahan"), both of whom were present at the meeting when the changes were made, that the FOP president and FOP solicitor agreed to the changes. Houck argues that such changes were not approved by the FOP. However, Houck was not present at the meeting nor did he produce any testimony by anyone at the meeting or from anyone from the FOP that the FOP did not agree to such changes. Houck merely relies upon his own unsupported suspicions for making such a claim. That is not sufficient to establish a genuine issue for trial.

Moreover, Houck did not produce any evidence that the changes in the promotion procedure were made in an effort to retaliate against him. Houck attempts to make this accusation by falsely stating several times that he (and possibly his brother, Thomas Houck) were the only police officers who passed the written examination portion of the promotion procedure. The fact is that under General Order 309 a passing grade on the written examination portion of the procedure was 70% or better. Houck received a grade of 66.89%. In an amazing sleight of hand, Houck adds five percentage points for seniority to his written test score to give him a 71.89% on the written test. However, seniority has nothing to do with the test score received on the written examination. It is a separate factor to be included in the overall evaluation process along with the oral interview and departmental evaluations. Under General Order 309 Houck, along with every other applicant, failed the written examination. This was the reason for the change in the promotion procedure, not any alleged effort to retaliate against Houck. Had General Order 309 not been changed, Houck would have been ineligible for promotion. Therefore, Houck cannot seriously claim that the promotion procedure was changed simply to retaliate against him.

Nor did the change in the departmental evaluation portion of the promotion procedure arise out of any motive to retaliate against Houck. The evidence is undisputed that the change originated from a complaint by the FOP that the applicants' immediate supervisors, who were originally to participate in the evaluation, did not have a uniform grading level, so that a person in one platoon might get an unfair advantage over a person in another platoon. It was in response to this complaint by the FOP that the departmental evaluation process was changed to provide greater uniformity in the evaluations. Although Houck questions the change in his brief, he produced no evidence to controvert the deposition testimony of Assistant Chief Monahan regarding the matter or purpose of the change in procedure. Furthermore, Houck offered no evidence to show that the modification was designed to facilitate Chief Stephens' ability to retaliate against Houck.

Houck incorrectly claims that the deposition testimony of Monahan is hearsay and may not be relied upon to establish the FOP's initiation of and consent to the changes in the promotion procedure. However, Monahan was present at the meeting and thus has first-hand knowledge of what occurred there. Monahan testified that the FOP president and FOP solicitor requested changes to the promotion procedure and consented to the changes that were made. That the FOP requested the changes, provided its reason for the request and consented to the changes are all relevant facts. Because the relevance of the statements by the FOP representatives is that they were uttered, not the truth of the matters asserted, Monahan's testimony about these statements is not hearsay.

On page 55 of his brief, Houck concedes that if the change in the departmental evaluation were made at the request of the FOP because the supervisors were using different standards to evaluate their patrolmen, then there was a legitimate business reason for the change. This is the exact evidence produced by the respondents

through the deposition testimony of Monahan. Monahan testified that at the meeting the FOP requested the change for the reason that the supervisors were using different evaluation standards. Houck has produced no evidence disputing these facts. Therefore, given his own admission, Houck cannot claim that the respondents made such changes to retaliate against him.

Moreover, nothing in the record supports Houck's assertion that one of the interviewers, Ms. Winters, was influenced by inaccurate information about the number of sick days taken by him. As the district court noted in refusing Houck's motion for reconsideration:

> Although the testimony showed that certain information about all the candidates were made available prior to the interview, including sick leave and workers compensation, there was no evidence offered to show, or from which it could be inferred, that this was done to direct prejudice at the plaintiff, or that the information was incorrect, or tainted, etc. Thus, we stated: "quite simply plaintiff has not pointed out any statement in Ms. Winters' deposition that she changed the score due to Chief Stephens' influence . . ." Plaintiff still has not brought to our attention any evidence to the contrary or to support his position that the oral interview was sabotaged.

Thus, as held by the courts below, Houck has failed to produce any evidence contradicting the facts established by the respondents, and he has failed to show a dispute as to issues of material fact. The respondents were therefore entitled to summary judgment. The courts below did not err in making such an award.

Finally, in his petition for writ of certiorari, Houck does not

allege that the Third Circuit erred in affirming the grant of summary judgment in favor of Mayor Joseph Daddona and the City of Allentown. Therefore, any such arguments must be deemed waived and may not be the proper subjects for review by this Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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